STATE CONTROL OF PUBLIC UTILITIES.[1]

I.

THE difference between public callings and private business is a distinction in the law governing business relations which has always had, and will always have, most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business might always refuse to sell if they pleased. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal. And the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports the mediæval system with its established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which gradually did away with the necessity for coercive law. Indeed in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good. And it is now reluctantly admitted that state control is again necessary over such lines of industry as are affected with a public interest. Thus with varying importance the distinction between the public callings and the private callings has been present in our law from the earliest times to the present day.

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II.

Some restraint has always been exercised over such lines of industry as are of vital interest to the public. The establishment of the peace, the protection of the weak against the physical violence of the strong, is a fundamental function of government; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. In matters not vital to the life and well-being of mankind the laws of society may be left free to operate without limitation by the sovereign power; but in all that has to do with the necessaries of life the protection of the sovereign is extended. The modern state protects equally against physical violence and against oppression that affects the means of living.

As a result of an economic evolution there have come into being in the last generation a considerable number of employments which have gained, if not a legal monopoly, at any rate, as a result of circumstances, a virtual monopoly in matters of public necessity. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in their favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that state control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief.

It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. Great power brings as its consequence the need of control of that power for the good of the whole people.

III.

Whether a business is public or not depends in last analysis upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so, there will be virtual competition; if not, there will be virtual monopoly. It will be found that, in all such businesses, competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. They are affected with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Plainly we have in the accepted use of these phrases the manifestation of a deep-seated change in habits of thought. Only twenty-five years ago the general feeling as to every sort of industrial relation was that it was better to leave all alone, that it was better to leave people to work out their own salvation. But of late years we have been calling upon the state to save us from monopoly in all its forms; and we are impatient if it delays.

The present situation is plain enough to all of us. Whatever way we turn we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers — railroads and steamships, coaches and cabs, street cars and omnibuses, the subway car and the elevated train. If we ship goods there are various transportation services at our disposal beside railroads and ships, such as express companies and dispatch lines, refrigerator lines and tank lines. If we are journeying ourselves we eat at hotel restaurants, and put up at public inns, or travel in palace cars and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to — for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and

for our exports, docks. In almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually, except the last two, by private companies in public service, but even where the service is provided by the municipality it is subject to the same law governing public service. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker-service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

IV.

The spirit of our present age demands that these great business enterprises shall be conducted in accordance with the requirements of society. The present program of organized society is to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action may, even in the industrial world, work injuriously for the public; and it must then be restrained in the public interest. We have seen the results of unrestrained power; and we no longer wish those who have control over our destinies left free to do with us as they please.

While state regulation is the prevailing philosophy of the people at the beginning of the twentieth century, it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men equally. Now, as at all times, there are conservatives and radicals, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been those who have been unable to appreciate the change; and in every such change there have been those who are unable justly to estimate the true meaning of the change.

Many persons still hold conservative views as to the application of the law of public callings to modern conditions. They believe

that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. But the most of men appreciate that the law has already taken control of the situation for all time. It is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation; and it must be met without further hesitation.

V.

In this crisis of affairs the people must be assured that the law is adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified, which are truly inconsistent with public duty. That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is not even an enlightened selfishness.

The time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of present conditions. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. The proprietors of the public services should be told sharply that they may not adopt, to the prejudice of their public, various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

There is now fortunately almost general assent to state control of the public service companies. Two ways only can be found to exercise such control. One way, that advocated by the most radical

statesmen, is the government ownership and operation of these services. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the utilities for the public good. One or the other of these methods must be finally adopted. The conservative method is now on trial. It behooves the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

VI.

All businesses both public and private are subject, to be sure, to that general police power of the state whereby in any civilized society the effort is made so to order things that one may not use his own so as to injure another. But the comparison of the large amount of regulation which it is considered proper for the state to impose in regard to public services with the small amount of regulation which it is considered proper for the state to enforce in regard to private business is in itself significant enough. The difference which is shown is more than one of degree, it becomes one in kind. It is only in public business that the law imposes affirmative duties; generally speaking, the duties imposed upon those in private business are negative. The law says to those in public business you must do this for this applicant, and you must do it thus. To those in private business it says you must not do this, or if you do this you must do it thus. This is the chief distinction between public calling and private calling.

General principles may now be developed and corollaries to them established by the use and with the co-ordination of cases from a variety of public employments. Not only are the fundamental principles true as to all public employments — that all must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made. But also in dealing with the minor detail of these principles, cases from one service will be found in point in another — as to what conditions there are precedent to service, what will excuse failure in provision of facilities, what is a proper basis for calculating rates and what differences constitute discrimination. This is the way our law grows, by break-

ing down the partitions between departments of the law which have been built up separately. The public service law has at length reached a stage of development in which it may be possible to state its principles with some degree of confidence. It is only within the last few years that it would have been within the range of possibility to do this.

Twenty-five years ago the public services that were recognized were still few, and the law as to them imperfectly realized. It was known from olden times that those who professed a public employment must serve all at a reasonable rate. As to the duty to serve, it was recognized that there were certain excuses. As to the restriction to reasonable rates, there was no standard unless, indeed, the customary charge. But the important duty to provide adequate facilities had hardly advanced beyond the general law as to negligence. And the duty not to discriminate, which according to present ideas is the most important of all, was denied altogether by the weight of authority. Even ten years ago when these four obligations had become generally recognized, the details as to them in regard to any particular employment had been worked out only in very fragmentary manner; but at the present day it is just being appreciated that rapid progress may be made by the general recognition of the unity of the public service law, whereby cases as to one calling may be used to show the law in all. It is only in our present day that the attempt to treat the public service law as a consistent body of law could be made with any hope of success.

VII.

As time goes on, one finds himself almost among the conservatives in standing by the original program for state control. And yet one may still hope that the state will as far as possible confine itself to regulation, leaving the companies to work out their own problems of management. State control need seldom go further than regulation in this sense. Whatever the companies may do should be subject to immediate revision by the constituted authorities. There should be swift reparation provided for any individual who has suffered harm in the meantime. And that should be the full extent of governmental regulation, generally speaking. When the state

goes further, and attempts to dictate as to the policies which the companies shall adopt, it usually goes too far. Legislation going to this extent really crosses the line which divides state control from state operation.

It has been said above that there are two general ways of dealing with the problem—state control and state operation. Few would stand out for uncontrolled action without state supervision; few would believe in the permanence of state ownership combined with private operation. We must choose between state control which we know about and state operation with its unknowable consequences. The restriction which the federal government has thus far put upon itself in regulating interstate carriage is well advised. The Interstate Commerce Commission still has virtually only the power of revision. In some of the states, however, the commissions are virtually given the power to determine of their own motion what the carrier shall do for the public. This imposes government operation, without relieving the railroad from its responsibilities in any way.

This does not mean that everything shall be left to the discretion of the companies, as the conservatives claim. Discretion should be left to the companies, but it should be made clear that this discretion may be abused. Although the companies should be left as free as possible to work out their own problems within the law, they should be warned that they must not go outside the limits which the law is fixing. For example, the railroad people once claimed the right to make such rates as it seemed to them would be for the best interests of all concerned. But so long as this power is left in the hands of the railway management without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious city into a wilderness again. It is believed that these are too great powers to intrust to private hands without governmental control based upon some recognized standards. Indeed the public law in this, as in the other cases, should put sufficient limitations upon any business policy, however profitable, which comes in conflict with the fundamental principle of equal service to all.

VIII.

The whole problem of the regulation of public utilities has been seen more steadily of late years. It has been appreciated that in dealing with a public service company the state is really dealing with a private business concern, however many the obligations may be which it owes to the public. The risks its proprietors run are such that their financial management should be left to them, unless they be shown to be taking profit with outrageous disregard of their public obligations. With these broader views, it would be surprising if more consideration were not paid to the rights of the owners of public services. Perhaps for the moment there is danger that in emphasizing their duties their rights may be forgotten. That the courts are approaching this great issue of state control with the enlightened policy of fair compromise of conflicting interests is plain. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with great caution. Our social system rests largely upon the basis of private property, and that community which seeks to alter this will soon discover its error in the disaster which follows.

But no one who is inspired to any degree by the spirit of the age would entertain the suggestion that we ought to work to turn the law back to that time twenty-five years ago when those who had the control of public utilities were, by a failure to apply the law promptly, left to deal with their public as they pleased. The most of us of this generation not only believe in state control of the public employments, but in its enforcement so far as it is necessary. For liberty does not mean to men at the beginning of the twentieth century what it meant to men at the beginning of the nineteenth century. When the theory of *laissez faire* prevailed it meant liberty for the individual to do as he pleased with his own. To-day we know that in order that a man shall be free he must be protected from those who would do with him as they please. In order to protect the individual from the abuse of their power by others, we know that there can no longer be freedom of action for those who have gained undue power. We are beginning to appreciate that paradox which has come down to us from the sages of old, that liberty is not

to be had without restraint. In a modern state we are no longer content in seeing that the weak are safe from the violence of the strong. Not until the people generally are protected from the oppression of those who control their destinies will there be real liberty.

IX.

We are just entering upon a great and important development of the common law. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure, have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public services in all contingencies may these businesses be left in private hands.

This principle of state control does not lead one to socialism; indeed, it saves one from socialism if truly understood. It is only in those few businesses where the conditions are monopolistic that dangerous power over their public has been attained by those who have the control. In most businesses the virtual competition which prevails puts the distributors at the mercy of their public. In current opinion the recognition of this distinction is manifest. Men are as eager for an open market as ever; but they wish the control of monopoly to insure it. The demand is for freer trade where competition prevails and stricter regulation where monopoly is found. So long as virtual competition prevails there is no necessity for coercive law, since there is then no power over the purchasing public. But where in any business virtual monopoly is permanently established the people will not be denied in their deliberate policy of effectual regulation of such public services for the common good.

Only to this extent the individualistic ideal of society gives place to the collectivist policy. It is with true appreciation of the real issue that we are contending for state control to gain individual liberty. It may once have been the ideal of industrial freedom that

a man might do as he pleased with his own; in any event that is no longer our notion of social justice. It is believed now that with increase in power over the particular market comes increase in responsibility to the dependent public. Socialism would destroy all private interests in the name of the public; regulation would preserve private interests by reconciling them with public right. Socialism attacks all capital to whatever business it is devoted; regulation grapples with monopoly only when it is convinced that there is no other way to safeguard the interests of the public.

X.

So far as one can judge, the future holds no possibility of the coercive regulation of the conduct of all businesses, which it is apparent would be one form of socialism. Regulation of this extreme sort will be confined to those businesses which are affected with a public interest. It is, however, certain that the other businesses than those now within this classification will be brought within it. Indeed, the generalization must have occurred to the reader that all businesses which have a virtual monopoly firmly established in the nature of things, are so affected with a public interest as to be within the class of callings which are considered public employments. What branches of industry will eventually be considered of such public importance as to be included within the category of public callings it would be rash to predict. But no one can study the authorities on this subject without feeling their great potentialities. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the modern trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. If this law might be enforced against the trusts, perhaps a solution of the problem would be found.

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